DATUK BANDAR KUALA LUMPUR

v.

SEMAN BIN AMAT & 2 OTHER CASES.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ABDUL KADIR SULAIMAN J
[CIVIL APPEALS NOS. Rl-11-64-96, R2-11-65-96,R3-11-66-96]
10 JULY 1996

CIVIL PROCEDURE: *Preliminary objection - Principles - Prior notice Whether a necesssary prerequisite - Respondents taking up preliminary objection at the 11th hour without prior notice - Whether appellant taken by surprise - Appellant given time to reply but replied to objection instantly - Effect - Whether element of surprise eliminated - Whether objection to be allowed.*

CIVIL PROCEDURE: *Appeal - Appeal to Judge in Chambers arising from application under O. 26A Subordinate Courts Rules 1980 - Filing of notice of appeal - Notice filed with registry of Subordinate Court - Whether a misfiling - Whether fundamentally wrong - Whether appeal not properly brought before the High Court - Whether jurisdiction of Judge in Chambers ousted - Subordinate Courts Rules 1980, O. 1 r. 8, O. 49 rr. 2(3)(5), 6(l)(2) - Rules of the High Court 1980, O. 2 r 1(2), O. 53 r. 2.*

The appellant, the Datuk Bandar of Kuala Lumpur, had obtained summary judgment against the respondents under O. 26A Subordinate Courts Rules 1980 (SCR). The respondents appealed against the summary order and pending appeal applied for a stay of execution. An order for stay was granted by the learned Magistrate wherefore the appellant appealed against the stay order, and subsequently filed the respective notices of appeal with the registry of the Magistrate's Court.

The respondents took up a preliminary objection, albeit without giving the appellant any prior notice, that the notices of appeal, filed as they were in the Magistrate's Court, contravened r. 6 of O. 49 SCR, and that the appeals, as a result, were not properly brought before the Court. It was not in dispute that by r. 6(2) of O. 49 SCR, the notice of appeal against a decision of a Subordinate Court, other than a decision made after trial, ought to be filed with the Registrar of the High Court, and not with the registry of the Court appealed against. Rule 6(2) notwithstanding, the appellant retorted, however, that the failure to give prior notice herein was fatal to the preliminary objection, citing *inter alia Jasabena Sdn Bhd v. Beh Heng Poo & Anor.*

The facts showed that Counsel for the respondents, on account apparently of the absence of proper notice, had indicated a willingness to give the appellant time to reply, but the gesture was aborted by the appellant's Counsel who, in

the event, promptly replied to the objection. Before the learned Judge the primary issues that arose were:

(i) whether the respondents were barred from raising the intended preliminary objection

(ii) whether the preliminary objection, in any case, had taken the appellant by surprise and therefore ought not to be allowed.

(ii) whether the appellant had filed the notices of appeal in the wrong registry of the Court, and if so, whether such wrong filing had resulted in no appeal being "brought" within the meaning of r. 6(2) RSC as to oust the jurisdiction of the Judge in Chambers.

Held:

[1] It is a good practice for a party intending to raise a preliminary objection to do so by giving prior notice. However, it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection.

[2] The observations made in *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor. and Gurbachan Singh v. Seagrott & Camphell (No. 2)* in respect of preliminary objection *inter alia* that "*notice in writing of an intention to do so should be given at the earliest possible moment"* are merely obiter. It is to be noted that the learned Judge in *Jasabena* merely said that it was unfortunate that the respondent therein had raised the objection without any prior notice.

[3] The principle behind the need for prior notice is merely to avoid surprise. Therefore, if, by the conduct of the opponent, it can be inferred that no surprise to him has been caused, the objector should be allowed to raise the intended preliminary objection even without any notice.

[4] In the instant case, though the oral notice was given at an eleventh hour, Counsel for the respondents did not press for an immediate reply thereto. Counsel for the appellant, however, did not avail the opportunity given but instead gave reply straightaway. The latter, in the circumstance, cannot any more say that he was taken by surprise by the late notice.

[5] Any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the Court cannot ignore or condone the illegality as it goes to the very jurisdiction of the Court in the proceedings. Bearing in mind this factor, and the arguments of the parties, the respondent ought to be allowed to raise the intended preliminary objection.

[6] The objection taken before this Court concerns the issue of the filing of the notice of appeal in the wrong registry. The answer to this question must therefore fall on the construction of r. 6(2) of O. 49 of SCR which speaks of the filing and serving of the notice of appeal in respect of decisions made by the Court other than a decision after trial.

[7] By r. 6(2) SCR, a time period is given for the filing of the notice of appeal as well as for the service of the copy thereof. The time period for the service thereof is given by the rule to be within the time limited for the filing of the appeal to the Registrar of the High Court, which is 14 days from the day on which the decision was pronounced. It follows that the notice of appeal in such a case must be filed with the Registrar of the High Court.

[8] The reasoning aforesaid is fortified by the fact that r. 6 is a provision distinct from the other provisions in O. 49. This is so because of the use of the phrase *"notwithstanding anything contained in this Order"* appearing at the beginning of r. 6(l). This phrase takes away the operation of other provisions contained in O. 49, in particular, r. 1 to r. 3A which are concerned with appeal procedure in respect of appeal from a decision made after trial. Such being the position, r. 2 does not apply when dealing with appeal from a *"decision made by the Court other than a decision made after trial"* the phrase employed in r. 6(l).

[9] As the filing of the notice of appeal is to be with the Registrar of the High Court, Form 140 is to be used with the necessary variation as to the address printed therein. This is allowed by O. 1 r. 8 Subordinate Courts Rules 1980.

[10]The word "shall" in r. 6(2) is mandatory as it is a condition precedent that a notice of appeal be filed and served before an appeal can be said to have been properly brought. By filing at the wrong registry, no appeal is "brought" within the meaning of r. 6(2), and as such, the jurisdiction of the Judge in Chambers is ousted and it will be illegal for the said Judge to carry on hearing the so called appeals. In any case, the filing done in the wrong Court registry is fundamentally wrong and that by itself gives this Court the power to have these three appeals set aside pursuant to O. 2 r. 1(2) Rules of the High Court 1980.

[Respondents' preliminary objection allowed. Appellant's appeals struck out]

Cases referred to:

Jasabena Sdn. Bhd v. Beh Heng Poo & Anor. [19851 1 MLJ 394 ***(refd)***
Gurbachan Singh v. Seagrott & Campbell (No. 2) [1962] 28 MLI 370 ***(dist)***
Tan Ting Kok v. Cheong Lep Keen & Anor. [19691 1 MLJ 153 ***(dist)***
Sykt. Telekom Malaysia Bhd v. Business Chinese Directory Sdn. Bhd [19941 2 CLJ 729; [1994] 2 MLJ 420 (SC) ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1(2), O. 53 r. 2
Rules of Supreme Court 1957 (U.K), O. *58* rr. 1A(l), 2, 15
Subordinate Courts Rules 1980, O. 1 r. 8, O. 26A, O. 49, rr. 1, 2, 2(3), 2(5), 3, 3A, 6, 6(l), 6(2)

For the appellant - Thangaraj Balasundram; M/s. Thangaraj & Associates
For the respondents - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Abdul Kadir Sulaiman J:

Civil Appeal Nos. 11-64-96, 11-65-96 and 11-66-96 were heard together as each involves the same issue and the same appellants, the Datuk Bandar of Kuala Lumpur. By a separate summons in the Magistrates Court the appellants applied for vacant possession of the Council flats occupied by the respective respondents, mesne profit and costs. By respective applications under O. 26A of the Subordinate Courts Rules 1980 (the SCR), the appellants applied for summary judgments which were accordingly granted by the learned Magistrate. The respective respondents appealed to the High Court against the decisions for summary judgment granted by the learned Magistrate and their appeals are pending. In the meanwhile, the respective respondents applied for the stay of execution of the judgments pending the outcome of their appeals which applications were granted by the learned Magistrate. Hence these appeals by the appellant against the order for stay. Their notices of appeal were filed with the Magistrates Court and not with the Registrar of the High Court. These appeals were heard on certificates of urgency granted owing to the expediency of the disposal of the matter in dispute as the appellants need the land where the flats are situated urgently for development for use during the coming Commonwealth Games.

Before the formal hearing of the three appeals, the learned Counsel for the respondents, En. Karpal Singh raised a preliminary objection on a point of law in that as the various appeals of the appellants were filed in the registry of the Subordinate Court the appeals are not properly brought before the High Court being in contravention of O. 49 r. 6 of the SCR. It is contended that the notices of appeal were not filed in the proper registry as required by the said r. 6. Rather unfortunate, however, no prior notice of the intention to raise the preliminary objection was given by the respondents to the appellants except for the indication given to their learned Counsel orally just before the commencement of the hearing of the appeals. Conceding that no prior notice of their intention to do so was given to the appellants, the learned Counsel for the respondents indicated that he was not pressing for an immediate reply from the appellants and in the circumstances the appellants could be allowed time to do so. The contention by the learned Counsel for the respondents is that the purpose behind the practice requiring prior notice is merely to avoid

surprise to the opponent. Thus if the appellants are given time to reply, there would not be anymore element of surprise in allowing the preliminary objection to be brought at the eleventh hour before the hearing of the substantive matter particularly if it involves a point of law.

In opposition, the learned Counsel for the appellants cited *Jasabena Sdn. Bhd. v. Beh Heng Poo & Anor.* [1985] 1 MLJ 394. In that case the sole question for decision of the Court concerned the meaning and ambit of the phrase "entered for hearing" in O. 53 r. 2 of the Rules of the High Court 1980 (the RHC). It arose on a preliminary objection taken by the respondent without any prior notice given to an application by the applicant for an order of *certiorari.* By way of observation his Lordship at p. 396 said:

> Before concluding, I have an observation to make, and it is this: Counsel for the respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent. This was unfortunate and I would echo the practice advocated by Thomson, CJ in *Gurbachan Singh v. Seagrott & Campbell* that when points such as this are proposed to be taken, notice in writing of an intention to do so should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.

However, in that case, even though no prior notice was given, the learned Judge heard the preliminary objection of the respondent though for lack of merit he dismissed the objection raised.

In *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] 28 MLJ 370, the respondents upon the service of the notice of appeal by the appellant out of the time period prescribed, issued "Notice of Preliminary Objection" in writing to the appellant that on the hearing of the appeal which was to take place in about 3½ months from then, he would apply for the appeal to be dismissed on the grounds that they were not served with the notice of appeal within the time limited for appeal whereby the appellant was in breach of the then O. 58 r. 1A(l), O. 58 r. 2 and O. 58 r. 15 of the RSC 1957. The then Court of Appeal allowed the preliminary objection and the appeal by the appellant was struck out with costs to the respondent. At p. 371 Thomson CJ has this to say:

> Before departing from the case I should observe that the procedure followed by the respondents, that is to say giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal comes on for hearing seems to be the course that was followed and certainly not disapproved of in the case of *In re Helsby.*

What is stressed in that case is that the notice of the preliminary objection, which happened to be in writing, was given by the respondents at the earliest possible moment. Whereas, in *Jasabena's* case *(supra),* no prior notice for the purpose was ever given at all. Notwithstanding that the learned Judge in *Jasabena's* heard the objection and by way of observation did mention that

prior notice in writing to do so should be given. In that light I would agree with the submissions made by En. Karpal Singh, the learned Counsel for the respondents, that the observations made in the two cases cited are merely obiter, as the two Courts were deciding on the issue raised in the two respective preliminary issues. Furthermore, the learned Judge in *Jasabena's* merely expressed that it was unfortunate that the respondent in that case had raised the objection without any prior notice. In my view, it is a good practice for a party intending to raise any preliminary objection to do so by giving prior notice in writing to avoid any further argument as to whether in fact any notice at all ever given and that the notice if given must be with prior notice so that the other party would not be taken by surprise. The opponent must be given the opportunity to prepare himself to answer to the objection to be raised. This objective is achieved by him being given ample notice of the nature of the objection to be raised. In this present case, though an eleventh hour oral notice was given, the learned counsel for the respondent is not pressing for an immediate reply to the objection to be raised. He is prepared to allow time for the learned Counsel for the appellant to do so which the learned Counsel, however, did not avail the opportunity given but instead gave his reply straightaway. Therefore, he cannot any more say that he was taken by surprise by the eleventh hour oral notice of the preliminary objection to be made. It is also my view that it is not the law that the absence of prior notice will totally shut the door for the intended objector from raising the objection. The principle behind the need for the prior notice is merely to avoid surprise. But if by the conduct of the opponent it can be inferred that no surprise to him has been caused as in this present case, the objector should be allowed to raise the intended preliminary objection even without any notice as was done in *Jasabena's* case itself. Any preliminary objection raised may go to the root of the matter such as illegality in the proceedings taken. If it is so, the Court has to accept the fact and cannot ignore the illegality as it goes to the very jurisdiction of the Court in the proceedings. The Court cannot condone illegality simply because no prior notice is given to raise the preliminary objection. Having heard the arguments by the two parties, I allowed the learned Counsel for the respondent to raise the preliminary objection albeit only a short and oral notice was given to the appellants.

The objection raised by the learned Counsel for the respondent is this. These appeals by the appellants were not properly brought and must be struck out. En. Karpal Singh submits that since the coming into force of r. 6 on 1 August 1993 by P.U. (A) 193/93, O. 49 of the SCR provides two methods for appeal against the decisions of the Subordinate Courts. In respect of decisions made after trial, it is governed by rr. 1 to 3A but in respect of decisions other than that made after trial, it is governed by the new r. 6. As the impugned decision of the learned Magistrate granting a stay of execution pending appeal is a decision other than a decision made after trial which is conceded to by the learned Counsel for the appellant, the appeal procedure to follow is as is

stipulated in r. 6. That being the case, under r. 6(2) the notice of appeal against the decision shall be filed with the Registrar of the High Court straight without the need for it to go through the Registrar of the Subordinate Courts as so required in respect of the appeal against the decision made after trial. He also pointed out that the difference with the procedure in relation to appeal against the decision made after trial is that there is no need for the Court appealed from to notify the appellant in Form 141 that the certified copy of the documents mentioned in r. 2(3) is ready and for the appellants to make any deposit to cover the costs of preparing copies of appeal record or to lodge sums of money by way of security for the costs of the appeal as required by r. 2 (5).

In the present case, the notice of appeal was filed with the Magistrates Court and not with the Registrar of the High Court. In the circumstances, En. Karpal Singh submits that these appeals by the appellants were not properly filed and brought. He again cited *Gurbachan Singh's case (supra)*, and also *Tan Ting Kok v. Cheong Lep Keen & Anor.* [1969] 1 MLJ 153 in support. These two cases involve the issue of late service of the notice of appeal on the respondents. Thomson CJ. in the former case, in construing r. 15 of the then O. 58 of the RSC 1957 followed the decision of the English Court of Appeal in the case of *Christopher v. Croll* a case arising under the old English O. LVIII r. 15 where Lord Esher, EN said in the judgment as follows:

> Rule 1 of O. LVIII says that 'all appeals should be brought by notice of motion', and r. 15 provides that no appeal from a final judgment in an action shall be brought after the expiration of a year. This seems to show that the appeal is 'brought' when the notice of appeal is served on the respondent.

In *Tan Ting Kok* Suffian FJ in upholding the preliminary objection raised said that the appeal has not been properly brought before the Court because of the late service of the notice of appeal on the respondent following *Gurbachan Singh's* case. As this matter before me does not concern the issue of late service but on the issue of the filing of the notice of appeal in the wrong registry, the two authorities are not in point. It therefore falls on the construction of r. 6(2) of O. 49 of SCR itself. The said r. 6(2) states:

> (2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the **Registrar of the High Court**
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> (emphasis is added).

Therefore, for there to be an appeal brought there must be filed a notice of appeal in Form 140 within the time so prescribed by the rule. Following the filing of the notice of appeal, a copy of the notice of appeal must be served on every other party to the proceedings, which normally is the respondent.

This service of the copy of the notice must be done within the time limited for the filing of the appeal. In this case, it must also be within 14 days from the day on which the decision appealed from was pronounced. So far there is no problem in understanding that part of the provisions of r. 6(2). The next point to consider is, where should the notice of appeal be filed? The learned Counsel for the appellants says that the notice be filed with the Subordinate Court where the decision appealed against was pronounced. He based his contention on the address provided by Form 140, the form required by r. 6(2) to be used. En. Karpal Singh disagrees because of the wordings of the paragraph in the rule itself. I am inclined to agree with En. Karpal Singh. Rule 6(2) speaks of the filing and the serving of the notice of appeal in respect of decisions made by the Court other than a decision made after trial. A time period is given for the filing of the notice of appeal as well as for the service of a copy thereof. The time period for the service thereof is given by the rule to be within the time limited for the filing of the appeal to the Registrar of the High Court which in this case is within 14 days from the day on which the decision was pronounced. It therefore, follows that the notice of appeal in such a case must be filed with the Registrar of the High Court. My reasoning is fortified by the fact that r. 6 is a distinct provisions from other provisions in O. 49. This is so because of the use of the phrase 'Notwithstanding anything contained in this Order' appearing at the beginning of r. 6(l). This phrase takes away the operation of other provisions contained in O. 49, in particular, r. 1 to r. 3A which are concerned with appeal procedure in respect of appeal from a decision made after trial. Such being the position, r. 2 does not apply when dealing with appeal from a 'decision made by the Court other than a decision made after trial' the phrase employed in r. 6(l). If the filing of the notice of appeal is to be with the Registrar of the High Court, Form 140 is to be used with the necessary variation as to the address printed therein. This is allowed by O. 1 r. 8 as the circumstances of the case require that the notice of appeal be filed with the Registrar of the High Court.

Now that these three appeals relate to the decisions of the learned Magistrate in interlocutory proceedings, the notices of appeal must be filed with the Registrar of the High Court. By filing them in the wrong registry, En. Karpal Singh says it is illegal because the appeals cannot be said to have been brought before the Judge in Chambers. On the other hand, En. Thangaraj, for the appellants says, if true, it is merely an irregularity curable by O. 2 of the RHC. I cannot agree with En. Thangaraj. By filing at the wrong Registry, no appeal is 'brought' within the meaning of r. 6(2) and as such the jurisdiction of the Judge in Chambers is ousted and it will be illegal for the said Judge to carry on hearing the so called appeals. However, if I am wrong and it is merely an irregularity as contended by En. Tangaraj, the filing done in the wrong registry is fundamentally wrong and this by itself gives the power to this Court to have these three appeals set aside pursuant to O. 2 r. 1(2) of the RHC.

It is my finding that the word 'shall" used in r. 6(2) is mandatory for, it is a condition precedent that a notice of appeal be filed and served before an appeal can be said to have been properly brought. It is well enshrined in the law that rules of Court are to be obeyed. Failure to comply with them will lead to chaos in the conduct of litigation. See *Sykt. Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd.* [1994] 2 MLJ 420 (SC). By not filing the three notices of appeal in the Registry of the High Court as required by r. 6(2) the appellants in these three appeals had not obeyed the rules of Court. In the circumstances, for the reasons given, I strike out these three appeals with costs to the respondent.

Reported by W.A. Sharif